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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ORLANDOUS TYRONE JACKETT, Defendant and Appellant.	D071898 (Super. Ct. No. SCD264232 Super. Ct. No. SCD264057)

APPEAL from a judgment of the Superior Court of San Diego County, Laura W. Halgren, Judge. Affirmed and remanded for resentencing.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos, Kathryn Kirschbaum and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Orlandous Tyrone Jackett of the first degree murder of Xavier F. (the victim) (Pen. Code,[1] § 187, subd. (a); count 1) and found true an attached gang enhancement allegation (§ 186.22, subd. (b)(1)) and that he had personally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d)). The jury also convicted him of three counts each of possessing a firearm by a felon (§ 29800, subd. (a)(l); counts 2, 3, and 7), and child endangerment (§ 273a, subd. (a); counts 4-6). Jackett later admitted one strike prior conviction, one serious felony prior conviction, and three prison prior convictions. He also admitted that he was released on bail when he committed the murder. The trial court sentenced him to an indeterminate term of nine years plus 75 years to life in prison and a determinate term of 16 years four months in prison.

Jackett appeals, contending that the evidence does not support the child endangerment counts and one of the felon-in-possession counts. He also asserts that: (1) the trial court erred by failing to instruct the jury to consider the fact that part of his ex-girlfriend's trial testimony was subject to an immunity agreement, (2) his attorney was ineffective for failing to object to the prosecutor's comments during closing argument, and (3) the court erred by not severing the murder count and the felon in possession count associated with the murder from the remaining charges. Finally, he asserts that the cumulative effect of the purported errors was prejudicial. We reject these claims.

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1 Undesignated statutory references are to the Penal Code.

Jackett also asserts that he received ineffective assistance when his attorney allowed him to admit one of his prison prior allegations and that the matter should be remanded to allow the trial court the opportunity to strike his firearm enhancement. The People concede, and we agree, that these claims have merit.

In his rehearing petition, which we granted, Jackett further contends that Senate Bill No. 1393 (2017-2018 Reg. Sess.), effective January 1, 2019, also requires remand for the trial court to exercise its discretion to dismiss or strike his prior serious felony enhancement. People concede, and we agree, that this claim has merit.

GENERAL FACTUAL BACKGROUND

Drive-By Murder (*Counts 1 and 2*)

Jackett was a member of the Neighborhood Crips criminal street gang. In January 2013 Jackett's car was set on fire. A rival gang took credit for burning Jackett's car. Jackett's gang criticized him for not retaliating. Jackett told his former girlfriend, Margie D., that he was going to " 'F' " whoever was responsible for burning his car.

About two months later, Jackett got into his red Range Rover and went to the rival gang's territory to "hunt" for a rival gang member. Jackett saw the victim, a pedestrian, wearing clothes in the rival gang colors and a baseball cap embroidered with what appeared to be a gang moniker. Jackett fired multiple gunshots at the victim from his car, killing him. The victim suffered multiple gunshot wounds; one wound was consistent with being shot from behind.

About one minute after the shooting, Jackett called Margie and asked her to pick him up at his aunt's house, close to where the murder occurred. Sometime after the

murder, Jackett disassembled the gun he used to kill the victim, told Margie that he needed to get rid of it, and dumped the gun into a marina.

Margie told police that Jackett admitted to her that he had killed the victim. Margie, however, was unwilling to repeat that claim during trial, stating she could not remember. Margie also suggested to police that Jackett had someone burn the Range Rover after the murder and that she was not involved in the arson of the Range Rover. At trial, under a grant of immunity pursuant to section 1324,[2] Margie testified that she asked for the Range Rover to be burned and that she did so for the insurance money.

Child Endangerment and Felon in Possession of Firearm (*Counts 3-6*)

In February 2014 officers searched Jackett's home which he shared with Margie; their child; Margie's father, William; and Margie's three other children, who ranged in age from four to eight. When the officers entered the home, three children were lying on the couch in the living room in their pajamas, as though they were about to go to sleep.

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[2] Section 1324 provides, in relevant part: "In any felony proceeding . . . if a person refuses to answer a question . . . on the ground that he or she may be incriminated thereby, and if the district attorney . . . in writing requests the court . . . to order that person to answer the question . . . a judge shall . . . order the question answered . . . unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction, and that person shall comply with the order. After complying, and if, but for this section, he or she would have been privileged to withhold the answer given or the evidence produced by him or her, no testimony or other information compelled under the order or any information directly or indirectly derived from the testimony or other information may be used against the witness in any criminal case. But he or she may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. Nothing in this section shall prohibit the district attorney or any other prosecuting agency from requesting an order granting use immunity or transactional immunity to a witness compelled to give testimony or produce evidence."

The police moved William and the children to the kitchen while they conducted a search. Under one of the couch cushions police found a plastic bag with a loaded handgun inside. The gun had 18 cartridges in the magazine and one round in the chamber. The gun did not have a safety and it would "not take a lot of pressure on th[e] trigger to discharge the live-round ammunition that's inside the chamber."

The officers concluded that the home was a dangerous environment for the children. When one of the officers told the children they would have to leave the house, one of the children told the officer that the gun belonged to Jackett and pointed to a photo of Jackett and Margie. Subsequent DNA testing revealed that Jackett was a possible major contributor to the mixture of DNA found on the gun, while William was excluded as a contributor. Margie denied any knowledge of the gun and insinuated that Jackett placed it there.

Felon in Possession of Firearm (*Count 7*)

One evening in August 2014 a gang officer attempted to contact Jackett on the street. As the officer opened his car door, Jackett took off running and the officer gave chase. Jackett jumped a fence into someone's yard and continued to run. The officer eventually caught Jackett hiding underneath a parked car. Officers searched the yards that Jackett had run through, but did not find anything.

The following morning, the resident of a house adjacent to where Jackett had been running the night before reported finding a gun inside a sock in his yard. The resident had been working in the yard the day before, and the gun had not been there. DNA

testing on the gun and sock revealed a mixture of DNA from at least four individuals, but it was determined that Jackett was not a major contributor to the DNA mixture.

DISCUSSION

I. *SUFFICENCY OF EVIDENCE*

A. *General Legal Principles*

Where a defendant challenges the sufficiency of the evidence supporting a conviction, we examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*Ibid.*) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court[,] that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' " (*Id.* at pp. 1053-1054.) Reversal for insufficient evidence is warranted only when it appears that under no hypothesis whatsoever is there sufficient evidence to support the jury's verdict. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

B. *Child Endangerment*

Jackett contends that his child endangerment convictions must be reversed because there was no evidence showing when or how the gun was placed under the cushion, who placed it under the cushion, or that he had care and custody of the minors at the time of the offense.

Felony child endangerment occurs when a person "under circumstances or conditions likely to produce great bodily harm or death, . . . having the care or custody of any child, . . . willfully causes or permits that child to be placed in a situation where his or her person or health is endangered." (§ 273a, subd. (a).) This statute is intended to protect a child from situations where the probability of serious injury is great. (*People v. Sargent* (1999) 19 Cal.4th 1206, 1216.) In endangerment cases, "the necessary mens rea . . . is criminal negligence." (*In re L.K.* (2011) 199 Cal.App.4th 1438, 1445.) "Criminal negligence ' "is aggravated, culpable, gross, or reckless . . . conduct [that is] such a departure from [that of the] ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life." ' " (*People v. Valdez* (2002) 27 Cal.4th 778, 783.) Criminal negligence is evaluated objectively and does not turn upon the defendant's subjective intent. (*Ibid.*) " ' "[I]f a reasonable person in defendant's position would have been aware of the risk[s] involved, [it is presumed that defendant] had such awareness." ' " (*Ibid.*)

Viewing the record in the light most favorable to the judgment, the jury could reasonably find that Jackett had care and custody of Margie's children when he resided at the home. "The words 'care or custody' are commonly understood terms that have no

particularized meaning." (*People v. Perez* (2008) 164 Cal.App.4th 1462, 1475.) "[T]he relevant question in a situation involving an individual who does not otherwise have a duty imposed by law or formalized agreement to care for a child (as in the case of parents or babysitters), is whether the individual in question can be found to have undertaken the attendant responsibilities at all. 'Care,' as used in the statute, may be evidenced by something less than an express agreement to assume the duties of a caregiver. That a person did undertake caregiving responsibilities may be shown by evidence of that person's conduct and the circumstances of the interaction between the defendant and the child; it need not be established by an affirmative expression of a willingness to do so." (*Id.* at p. 1476, fn. omitted.)

Here, Margie testified that Jackett was the father of one of her children and helped raise her other children. She testified that during 2012 and 2013 they lived together as "a family structure." While Margie and Jackett were unmarried, Margie took Jackett's last name. The jury could reasonably infer from this testimony that Jackett had care and custody of the children because he helped Margie raise them while living with her and the children.

The record also supports an inference that Jackett had placed the loaded gun under the sofa cushion. "An inference is a logical and reasonable deduction or conclusion to be drawn from the proof of preliminary facts. [Citations.] It is the province of the trier of fact to decide whether an inference should be drawn and the weight to be accorded the inference." (*People v. Massie* (2006) 142 Cal.App.4th 365, 373-374.)

Here, Jackett, Margie and William were the only adults living at the home. Margie testified that she and Jackett were still living together when the police searched the home on February 10, 2014. Margie did not know about the gun. Police did not test the outer plastic bag for DNA. The exterior of the gun contained the DNA profile of at least four different people. Jackett was a possible major contributor to the DNA, but complete typing in all marker locations was not possible. According to expert testimony, there was a one in 260 chance that the sample would match a random African-American, such as Jackett. After police found the gun, one of the children told an officer that it belonged to Jackett and pointed to a photo of Jackett and Margie.

Without citation to authority, Jackett suggests that to be convicted he needed to have care and custody of the children when police found the gun. However, the statute is intended to protect children from situations creating a great probability of serious injury. (*People v. Sargent*, *supra*, 19 Cal.4th at p. 1216.) "Storing loaded firearms in a home occupied by children without denying the children access to the weapons creates a potential peril under the statute." (*People v. Hansen* (1997) 59 Cal.App.4th 473, 479-480.) Here, Jackett's placement of a loaded gun within reach of children created the likelihood of serious injury. A police officer testified that the couch cushions were not heavy and could have been lifted by the children to access the weapon. As addressed *ante*, the evidence supported an inference that Jackett had care and custody of the children and, during this time, he placed the gun under the sofa cushion. The risk he created did not dissipate when he was not physically present at the residence.

Accordingly, substantial evidence supported Jackett's convictions for child endangerment.

C. *Possession of Firearm*

Jackett contends that sufficient evidence does not support his conviction for being a felon in possession of the firearm that the police found under the couch cushion. The elements of the crime of being a felon in possession of a firearm are conviction of a felony and ownership or knowing possession, custody, or control of a firearm. (§ 29800, subd. (a)(1); *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 [referring to former § 12021, subd. (a)(1), § 29800, subd. (a)(1)'s predecessor].) A violation of section 29800, subdivision (a)(1) requires proof that the defendant possessed a firearm, knew he possessed a firearm, and had previously been convicted of a felony. (CALCRIM No. 2511.)

The offense of being a felon in possession of a firearm is a general intent crime that can be committed by actual or constructive possession of a firearm. (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 130.) "A defendant possesses a weapon when it is under his dominion and control. [Citation.] A defendant has actual possession when the weapon is in his immediate possession or control. He has constructive possession when the weapon, while not in his actual possession, is nonetheless under his dominion and control, either directly or through others." (*People v. Pena* (1999) 74 Cal.App.4th 1078, 1083-1084.) "[P]ossession of a firearm by a felon is a continuing offense" (*People v.* Mason (2014) 232 Cal.App.4th 355, 365) such that " 'only one violation occurs even though the proscribed conduct may extend over [an] indefinite period.' " (*Ibid*.)

Here, CALCRIM No. 2511 informed the jurors that "[a] person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person." The jury could reasonably infer that Jackett had constructive possession of the gun found under the couch cushion because Jackett, Margie and William were the only adults living at the home, Margie did not know about the gun and William's DNA was not found on the weapon. Jackett was a possible major contributor to the DNA found on the gun. Additionally, one of Margie's children stated that the gun belonged to Jackett. This evidence was sufficient for the jury to reasonably infer that Jackett had constructive possession of the gun. (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1410 [An ex-felon possesses a firearm the instant he "in any way has a firearm within his control." (Italics omitted.)].)

II. *ALLEGED INSTRUCTIONAL ERROR*

A. *Additional Background*

At the preliminary hearing Margie had counsel present who represented to the court that Fifth Amendment issues existed, that Margie had been granted "use and derivative immunity" and suggested that the court order Margie to testify based on the grant of immunity. The court ordered Margie to testify based on that grant of immunity. The court learned that police had arrested Margie in December 2015 on felony charges of being an accessory after the fact to the victim's murder.

At trial, Margie admitted that she had a conversation with Jackett about having to "get rid of" the Range Rover. She admitted that she previously lied to the police by

telling them that she had heard Jackett ask someone else to burn the Range Rover.[3] When Margie did not want to testify regarding the Range Rover based on possible criminal liability, the trial court arranged to have Margie's prior attorney consult her. Outside the presence of the jury, Margie's attorney informed the court that Margie had a basis for asserting her privilege against self-incrimination. The trial court proposed that Margie be compelled to testify under a grant of immunity. Defense counsel then inquired whether he would be permitted to question Margie about incentives for her testimony. The prosecutor then stated that Margie was not receiving immunity from the People, but that the court was compelling her to testify under section 1324. The following discussion then took place:

> "THE COURT: The Court is ordering her. We're in the middle of a murder trial, and she suddenly raised this issue no one was aware of before. I'm going to order her to testify, and I am ordering it can't be used against her, whatever she says.
>
> "[PROSECUTOR]: And, therefore, it is not a benefit. And that's the distinguishing factor between [section] 1324 immunity and use immunity that's provided by form of a letter. I understand [defense counsel's] question, but—
>
> "THE COURT: Does the jury get to know . . . the Court has ordered her to testify?
>
> "[PROSECUTOR]: I don't believe so. I don't think it would be appropriate to. It doesn't fall under—I don't think that a person asserting a privilege under the law is something that can be—when they have a valid right, when they're being compelled. [¶] I'm looking at my brief right now to confirm, but I don't believe so because it doesn't fall under—let me read my brief again, Your Honor, make sure I'm not misspeaking, but I don't believe so."

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[3] The jury viewed Margie's videotaped interview with police and received a transcript of the police interview.

The trial court informed Margie that based on the district attorney's written request under section 1324 it was ordering her to answer questions regarding the Range Rover and also ordering that the district attorney could not "use the testimony or other information compelled under this order or any information directly or indirectly derived from the testimony or other information to be used against [her] in any criminal case, although [she] would be still subject to prosecution for any perjury or false testimony or contempt, but [she is] ordered to answer the questions."

When Margie resumed her testimony and the prosecutor asked her about the Range Rover, Margie initially testified that she did not know how the car got burned, but then stated she asked for the car to be burned and that she did so for the insurance money.

Later that day, outside the jury's presence, defense counsel expressed concern that Margie might commit perjury under the erroneous belief that she could not be prosecuted for anything that she said during her testimony. The court disagreed, stating that it read Margie that portion of section 1324 that stated she could be prosecuted for perjury and that Margie's attorney explained this to her, "So I think the combination of those two things would make me feel she understood she doesn't get a free pass for perjury." The court later indicated to defense counsel that he could "quiz [Margie] about [her changed testimony regarding the burning of the Range Rover] all you want."

The next morning, the court informed counsel that if a witness has an immunity agreement with the prosecution, it is appropriate to include in the jury instructions reference to that fact.

The court ruled that defense counsel could not tell the jury that Margie asserted the Fifth Amendment, but he could comment on the fact that Margie's testimony was subject to a grant of immunity. However, when defense counsel resumed his cross-examination of Margie, he did not inquire about the grant of immunity. He asked Margie no questions on that subject and no other evidence about Margie's immunity was offered or received in front of the jury in the entire case.

In instructing with CALCRIM No. 226 regarding how to evaluate witness testimony, the court did not include a bracketed portion of CALCRIM No. 226 that provides: "Was the witness promised immunity or leniency in exchange for his or her testimony?"

B. *Analysis*

Jackett notes that at the preliminary hearing, and at trial, Margie testified under a grant of immunity. He contends the trial court erred in failing to sua sponte instruct the jury with that portion of CALCRIM No. 226 that would have permitted the jury to take the grant of immunity into consideration when evaluating Margie's testimony. Jackett contends this error was prejudicial because his entire defense was centered around discrediting Margie's testimony. He claims that the prosecutor's closing argument exacerbated the error because he repeatedly cited Margie's testimony admitting her role in burning the Range Rover for insurance proceeds as proof of her candor, while concealing the fact that Margie received full immunity for that crime. In the event we conclude defense counsel forfeited this issue by failing to object to the instruction and failing to

accept the trial court's invitation to disclose the immunity to the jury, Jackett submits that he received ineffective assistance of counsel.

"[W]itnesses may not be compelled to incriminate themselves." (*People v. Williams* (2008) 43 Cal.4th 584, 613.) A trial court must permit a witness to exercise his or her Fifth Amendment privilege if there is any possibility the witness's testimony could serve as a link in a chain of evidence tending to establish guilt of a crime. (*Id.* at p. 614.) To deny an assertion of the privilege, the court must be " ' "*perfectly clear*" ' " that the witness is mistaken and the witness's answers cannot possibly have a tendency to incriminate. (*Ibid.*) "When a court determines that a witness has a valid Fifth Amendment right not to testify, it may not require the witness to invoke that privilege in front of a jury." (*People v. Murillo* (2014) 231 Cal.App.4th 448, 458.)

Under the California immunity statute, a witness who invokes the Fifth Amendment privilege against self-incrimination can be compelled to testify if, upon the prosecutor's request, the court grants the witness immunity from prosecution based on the compelled testimony. (§ 1324.) The prosecutor is statutorily authorized to request a judicial order mandating that a witness provide answers on topics that witness has characterized as self-incriminating, so long as "no testimony or other information compelled under the order or any information directly or indirectly derived from the testimony or other information may be used against the witness in any criminal case." (*Ibid.*) Section 1324, however, withholds immunity from prosecution for perjury committed in giving that testimony.

The trial court must instruct on the credibility of witnesses in every criminal case. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883 [the substance of CALJIC No. 2.20 should "always be given"].) CALCRIM No. 226 largely tracks the language of CALJIC No. 2.20 concerning the factors that a jury may consider in assessing the witnesses' credibility. Bracketed paragraphs in CALCRIM No. 226 provide additional, optional factors which may be included with the instruction, but the trial court has no sua sponte duty to include those bracketed factors which are not supported by the evidence. (*Rincon-Pineda*, at pp. 883-884 [the substance of CALJIC No. 2.20 should always be given, but those paragraphs that are inapplicable under the evidence may be omitted].) The bench notes to CALCRIM No. 226 state that a trial court is to "[g]ive all of the bracketed factors that are relevant based on the evidence." (Bench Notes to CALCRIM No. 226, p. 58.)

After Margie invoked her Fifth Amendment right the trial court concluded that it was appropriate to instruct the jury that Margie was testifying under a grant of immunity, and the court stated it would allow defense counsel to raise this issue. Defense counsel, satisfied with the court's tentative ruling, asked the court for "parameters on what I can talk about." The court stated that defense counsel could not ask questions to elicit that Margie claimed the Fifth Amendment, but that he could indicate that at the beginning of Margie's testimony, the immunity order did not exist, that defense counsel "could reference the fact, 'You remember yesterday when we took a break, a lengthy break, and after that the Court directed you to testify or ordered you to testify and—with a grant of immunity.' I mean, something along that line. You can even use the reference from the

order. I mean, that way you are avoiding the Fifth Amendment issue and you are also giving a frame of reference as to when the order was made." The court indicated that defense counsel could ask "if that affects her if she changed her testimony because of it. I don't know. I'm not going to tell you what to ask."

Despite being given permission to elicit evidence that Margie was testifying under a grant of immunity, defense counsel never asked Margie any questions about immunity. Neither counsel questioned Margie about immunity, and the jury never heard the word "immunity" mentioned during trial. The record does not support Jackett's contention that the trial court erroneously "concealed" Margie's grant of immunity from the jury.[4]

Trial courts are required to instruct the jury on all general principles of law relevant to the issues raised by the evidence, even absent a request. (*People v. Smith* (2013) 57 Cal.4th 232, 239.) A "grant of immunity may be considered as *evidence* of interest or bias in assessing the credibility of prosecution witnesses." (*People v. Price* (1991) 1 Cal.4th 324, 446, italics added.) Because a grant of immunity is evidence, a trial court has a sua sponte duty to instruct on immunity only if the evidence supports

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4 Jackett appears to argue in his reply brief that Margie did not have the right to raise the Fifth Amendment at trial based on the prosecution's earlier grant of use and derivative immunity. Jackett, however, did not argue in his opening brief that Margie improperly invoked her Fifth Amendment privilege, or that the trial court improperly granted her immunity under section 1324, based on the existence of the use and derivative immunity agreement with the prosecution referenced at the preliminary hearing. Accordingly, we deem these issues forfeited. (*People v. Battle* (2011) 198 Cal.App.4th 50, 76.)

such an instruction. Because there was no evidence before the jury regarding any witness with immunity, the trial court had no sua sponte duty to instruct on immunity.[5]

Even assuming the trial court erred in failing to include the bracketed portion of the instruction, the error would be harmless. (*People v. Wright* (1988) 45 Cal.3d 1126, 1144.) Here, counsel questioned Marge about her statements to police and explored how those statements differed from her trial testimony. Defense counsel also obtained testimony from Margie regarding how distraught she was during the police interview because the police had taken her two-week-old baby and were threatening her with being charged as an accessory to murder. The unmodified CALCRIM No. 226 adequately conveyed the obvious point that a witness's testimony may be colored by her self-interest. Moreover, defense counsel argued to the jury that Margie was the "key" to the prosecution "get[ting] Mr. Jackett at any cost." He concluded his argument by stating "[n]one of what [Margie] said is to be believed."[6]

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[5] Although Jackett does not explicitly make the argument, we note that trial courts are not required to sua sponte instruct a jury that the testimony of an immunized witness should be viewed with distrust. (*People v. Freeman* (1994) 8 Cal.4th 450, 508; *People v. Daniels* (1991) 52 Cal.3d 815, 867, fn. 20; *People v. Leach* (1985) 41 Cal.3d 92, 106.)

[6] An accomplice is a person "who is liable to prosecution for the identical offense charged against the defendant." (Pen. Code, § 1111; *People v. Boyer* (2006) 38 Cal.4th 412, 466-467.) Margie was not an accomplice as a matter of law because the murder had already happened when she learned of it and she did not share Jackett's intent to kill. Thus, case law requiring a court to sua sponte instruct a jury to view accomplice testimony with caution (see, e.g., *People v. Brown* (2003) 31 Cal.4th 518, 555) does not apply. Additionally, "[n]o California authority supports [the] contention that an immunized witness . . . is so analogous to an accomplice that a trial court must, upon request, give cautionary instructions as to the trustworthiness of immunized witness testimony." (*People v. Hunter* (1989) 49 Cal.3d 957, 977.)

Relying on *People v. Morris* (1988) 46 Cal.3d 1 (*Morris*),[7] Jackett next argues that the prosecutor had an affirmative duty to disclose to the jury that Margie testified under a grant of immunity. He also asserts that the People's "silence" on this issue in its respondent's brief "constitutes agreement with appellant that the prosecutor and trial court were obligated to inform the jury of the grant of immunity to [Margie]." We disagree with Jackett's assertion that *Morris* creates an affirmative duty for prosecutors to disclose to a jury that a witness is testifying under a grant of immunity. And, we reject his request that we construe the People's silence on this issue as a concession. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3 (*Hill*) [respondent's failure to respond to appellant's argument is not a concession of its merits], overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

At issue in *Morris* was an alleged violation of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) which requires that the prosecution disclose evidence that is both "favorable" to the defendant and "material" on the issue of the defendant's guilt. (*Id.* at p. 87.) Specifically, in *Morris*, the defense discovered after the conclusion of trial that the prosecution had failed to disclose to the defense evidence that the prosecution's key witness had cooperated with police. (*Morris*, 46 Cal.3d at pp. 24-30.) In this context, the *Morris* court stated:

> "The duty to disclose evidence bearing on the credibility of a prosecution witness manifestly includes any promises or inducements that have been made to obtain the witness's testimony. As we recently explained in *People v. Phillips* [(1985)] 41 Cal.3d

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7 *Morris* was disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, footnote 5.

> [29] at page 46, '[s]ince a witness's credibility depends heavily on his motives for testifying, *the prosecution must disclose to the defense and jury any inducements made to a prosecution witness to testify and must also correct any false or misleading testimony by the witness relating to any inducements*.' " (*Ibid*.)

Morris is not applicable here because unlike defense counsel there, here Jackett's lawyer knew during trial that Margie had been granted immunity. *Morris* is a *Brady* case, and Jackett raises no *Brady* issues here.

Jackett's reliance on *People v. Phillips*, *supra*, 41 Cal.3d 29 (*Phillips*) is also unavailing. There, the trial court prevented defense counsel from examining the prosecution and a witness's counsel regarding the existence and terms of an alleged immunity agreement. (*Id.* at pp. 45-46.) The *Phillips* court concluded that the trial court erred "when it held that any agreement not communicated to [the witness] was irrelevant to the issue of her credibility. The defense counsel is entitled to discover the terms of any agreement for lenient treatment negotiated on behalf of a prosecution witness." (*Id.* at p. 48.) Although *Phillips* requires the prosecution to disclose to the defense before trial "[a]ny exculpatory evidence" (*id.* at § 1054.1, subd. (e)) and "[r]elevant . . . statements of witnesses . . . whom the prosecutor intends to call at the trial" (§ 1054.1, subd. (f))—here nothing was concealed from Jackett's attorney about Margie's grant of immunity. Counsel knew of it, received guidance from the trial court about how to get that evidence before the jury—but apparently decided to not raise the issue during Margie's testimony.

In its discussion, the *Phillips* court quoted *People v. Westmoreland* (1976) 58 Cal.App.3d 32 (*Westmoreland*). Similar to *Phillips*, *supra*, 41 Cal.3d 29, at issue in *Westmoreland* was whether defendants were denied a fair trial because the prosecution

willfully failed to disclose material evidence pertaining to the credibility of a key prosecution witness. (*Westmoreland*, at pp. 40-41.) Significantly, in *Westmoreland*, the prosecution not only failed to disclose to the defense discussions with a potential witness "as to the possibility of leniency in exchange for favorable testimony even though no offer actually was made or accepted" (*id.* at p. 47), but the prosecutor remained silent while the witness falsely testified that he had not been offered the opportunity to plead guilty to a lesser offense. (*Id.* at pp. 39, 44.) In this context, the *Westmoreland* court stated: "[P]rosecutorial authorities not only must disclose to the defense *and to the jury* any inducements made to prosecution witnesses for favorable testimony, but they are also under a duty to correct any false and misleading testimony pertaining to such inducements. (*Giglio v. United State*s [(1972)] 405 U.S. 150, 154-155, 92 S.Ct. 763, 766, 31 L.Ed.2d 104.) Failure to do so denies the defense access to material evidence, and this can result in the denial of a fair trial. (*People v. Ruthford* [(1975)] 14 Cal.3d 399, 406, 121 Cal.Rptr. 261, 534 P.2d 1341.)"[8] (*Westmoreland*, at p. 43, italics added.)

Westmoreland, *supra*, 58 Cal.App.3d 32 is materially distinguishable because there the witness falsely testified that there were no promises of leniency in exchange for her testimony. That testimony, known by the *Westmoreland* prosecutor to be false, triggered an obligation upon the prosecutor to correct that false and misleading testimony. (*Id.* at pp. 46-47.) In sharp contrast here, Margie did not inform the jury that she was *not* testifying under a grant of immunity; rather, as far as the jury knew, the issue

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8 *People v. Ruthford* was disapproved on other grounds in *In re Sassounian*, *supra*, 9 Cal.4th at page 545, footnote 7.

never arose. Unlike the facts in *Westmoreland*, here there was no false testimony relating to Margie's credibility that the prosecutor could be required to clarify or remedy. Accordingly, because the jury was not laboring under any misapprehension about any inducements for Margie's testimony, here the prosecutor had no affirmative duty to disclose to a jury the existence of Margie's s immunity agreement.

Jackett alternatively argues that he received ineffective assistance if defense counsel forfeited the right to proper instructions by "failing to object to the instruction and failing to take advantage of the trial court's invitation to disclose the immunity to the jury." To prevail on an ineffective assistance of counsel claim, Jackett must establish: (1) the performance of his counsel fell below an objective standard of reasonableness, and (2) prejudice occurred as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) We presume "that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) "On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Here, Jackett's ineffective assistance claim does not overcome the first prong of the *Strickland* test. First, there was no evidence before the jury to support instructing

with the optional factor regarding immunity; thus, defense counsel reasonably decided that there was no need to request the instruction. (*People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135 [evidence was insufficient to permit a reasonable jury to find that all elements of the necessity defense were established and thus counsel did not commit error in failing to request an instruction].)

Second, we also reject Jackett's suggestion that defense counsel provided ineffective assistance for failing to introduce evidence of the immunity grant. The record does not show that defense counsel was ever asked to explain why he failed to introduce this evidence and there are satisfactory explanations for this failure. For example, in her earlier statements to police, Margie vehemently denied having the Range Rover burned and suggested that Jackett had the Range Rover burned—evidence that the jury could have considered as showing his consciousness of guilt. (*People v. Hart* (1999) 20 Cal.4th 546, 620 [an attempt to destroy or suppress evidence is sufficient to instruct jury that it can infer a consciousness of guilt].) However, in trial testimony, Margie testified that she lied to police about Jackett having the Range Rover burned; she now admitted to burning the Range Rover to collect insurance money. Defense counsel may have decided that introducing evidence that Margie was testifying under a grant of immunity would undercut the credibility of her trial testimony that she—and not Jackett—caused the Range Rover to be burned. Moreover, at trial, Margie did not repeat her earlier claim to police that Jackett had killed the victim. Counsel's strategy of not offering evidence that may have undercut Margie's trial testimony is not constitutionally deficient just because it did not work. (*Harrington v. Richter* (2011) 562 U.S. 86, 109 [defense counsel is not

incompetent merely because "the defense strategy did not work out as well as counsel had hoped"].)

We "will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.) Because Jackett has not shown that " ' "there simply could be no satisfactory explanation" ' " (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267) for deciding not to present this evidence, his claim of ineffective assistance is more appropriately decided in a habeas corpus proceeding. (*Ibid.*)

III. *OTHER ALLEGED ACTS OF INEFFECTIVE ASSISTANCE OF COUNSEL*

A. *Failure to Object During Closing Argument*

1. Additional background

The prosecutor referenced CALCRIM No. 226 during closing argument and urged the jury to consider all of Margie's "biases, her prejudice, the relationship that she was in with the defendant." The prosecutor told the jury that while Margie did not want to testify against Jackett, she took her oath seriously and that she admitted to conspiracy to commit arson instead of sticking "to her self-preservation where she was talking about [Jackett] getting [someone else] to burn the Range Rover."

He continued, "She could have—how hard would it have been for her to just stick to this and tell you, yeah, he got [someone else]. She wasn't going to do that. She took her oath seriously. And there was that moment where she paused, she hesitated, she asked the Court . . . 'Can I ask you a question?' We took a little break. She came back,

and she basically owned up to 'It wasn't him who recruited [someone else], it was me. I was in on it. I thought it was insurance.' But she basically owned up to conspiracy to commit arson, conspiracy to commit insurance fraud. These are things that I would encourage you to think about."

Defense counsel responded to the prosecutor's argument that Margie "took [her] oath seriously and she really wanted to tell the truth," stating, "If [Margie] loved [Jackett] so much, then why lie about him on December the 2nd if it was all love? All of that was to throw him under the bus, but the prosecution wants you to think it was all because of love." Defense counsel pointed out that Margie was very detailed during her police interview.

2. Analysis

Jackett claims that the prosecutor committed misconduct during closing argument by asserting that Margie's admission to arson of the Range Rover with the intent to defraud an insurance company was an act of courage that provided independent proof of her fealty to the oath she took to testify truthfully. He contends that the prosecutor's argument was deceptive and indisputably false because Margie's admission to this crime was made under a grant of immunity requested by the prosecution, with no potential consequences to Margie. He notes that during closing argument, the prosecutor never uttered the word "immunity," despite repeatedly referring to Margie's admission to uncharged misconduct. Acknowledging that defense counsel forfeited the issue by failing to object below, Jackett contends that he was deprived of effective assistance of counsel when his attorney failed to object to the prosecutor's improper closing argument.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, and particularly pertinent here, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

As Jackett recognizes, a claim of prosecutorial misconduct cannot be raised on appeal without a timely objection and request for admonition. (*People v. Clark* (2016) 63 Cal.4th 522, 577.) Otherwise, his claim is reviewable " 'only if an admonition would not have cured the harm caused by the misconduct.' " (*Ibid.*) To prove a claim of ineffective assistance of counsel based on counsel's failure to object, Jackett "must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Additionally, he must establish prejudice, i.e., a reasonable probability that absent counsel's unprofessional errors the result would have been different." (*People v. Thomas* (1992) 2 Cal.4th 489, 530.) We "will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission. In all other cases the conviction will be affirmed and the defendant relegated to habeas corpus proceedings at which evidence dehors the record may be taken to

determine the basis, if any, for counsel's conduct or omission." (*People v. Fosselman*, *supra*, 33 Cal.3d at pp. 581-582.)

" '[T]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one[]' [citation], and 'a mere failure to object to evidence or argument seldom establishes counsel's incompetence.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 675.) "There are countless ways to provide effective assistance [and] [e]ven the best criminal defense attorneys would not defend a client in the same way." (*People v. Duncan* (1991) 53 Cal.3d 955, 966.) Because the decision whether to object to instances of prosecutorial misconduct is "inherently tactical . . . the failure to object will rarely establish ineffective assistance." (*People v. Maury* (2003) 30 Cal.4th 342, 419.)

Assuming the prosecutor's closing argument was deceptive and amounted to prosecutorial misconduct, and that an objection and request for admonition would not have been futile, the question is whether counsel's failure to object amounts to ineffective assistance or a matter of trial tactics.[9]

Jackett has not shown that there simply could not be a satisfactory reason for defense counsel's failure to object to the prosecutor's argument. A prosecutor is given wide latitude to vigorously argue the case and may make remarks based on the evidence and inferences drawn from the record. (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

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9 We reject Jackett's assertion that the People's failure to address in their respondent's brief whether the prosecutor's argument constituted misconduct is a concession of this issue. (*People v. Hill*, *supra*, 3 Cal.4th at p. 995, fn. 3.)

Although a defendant may "single[] out words and phrases, or at most a few sentences, to demonstrate misconduct, we must view the statements in the context of the argument as a whole." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

Defense counsel may have made the reasonable tactical choice to not call attention to the prosecutor's remarks, especially since the jurors had been instructed that they "alone, must judge the credibility or believability of the witnesses." (*People v. Ghent* (1987) 43 Cal.3d 739, 773 ["Counsel may well have tactically assumed that an objection or request for admonition would simply draw closer attention to the prosecutor's isolated comments."].) Defense counsel may have also decided, as a matter of trial tactics, that it would be more effective to counter the prosecutor's argument regarding Margie's credibility during his closing argument, which he did. Defense counsel started his argument by pointing out that Margie was the "key" to the prosecution "get[ting] Mr. Jackett at any cost." He concluded his argument by arguing "[n]one of what [Margie] said is to be believed."

Moreover, even if defense counsel had objected, we discern no reasonable probability that it would have resulted in an outcome more favorable to Jackett. (E.g., *People v. Maury, supra,* 30 Cal.4th at p. 389 ["prejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different' "].) Margie loved Jackett and did not want to testify against him. Her testimony regarding who burned the Range Rover was a collateral matter with the jury hearing two differing

versions from Margie.[10] With regard to the murder, however, Margie told the police that Jackett admitted to her that he had killed the victim. While Margie did not repeat that claim during trial, cellular telephone records placed Jackett near the murder scene and revealed that he telephoned Margie from that area almost immediately after the murder. These records corroborated Margie's testimony that Jackett called her and asked to be picked up from that area. Although eyewitness accounts differed, five witnesses observed a red– or burgundy–colored Range Rover or SUV at the murder scene. Three witnesses stated that the gunshots came from the red– or burgundy–colored vehicle. Finally, Margie told police that after the murder, Jackett took apart a gun and threw the pieces into a marina. At trial, Margie stated that what she told police about the gun was truthful, except for seeing Jackett taking the gun apart. Based on this evidence it is unlikely that an objection to the prosecutor's closing argument would have changed the outcome of Jackett's trial. Accordingly, Jackett failed to establish his claim of ineffective assistance of counsel.

B. *Sentencing*

1. Additional background

Among other things, the amended information charged Jackett with three prison prior enhancements. (§ 667.5, subd. (b).) The third prison prior charged was based on

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10 In a recorded police interview, which was played for the jury, Margie denied burning the Range Rover and suggested someone else had done the act for Jackett. At trial, under court order, Margie initially testified that she did not know how the car got burned, but then stated she asked for the Range Rover to be burned and that she did so for the insurance money.

case No. SCD242883 (case 883), a plea of guilty to the possession of marijuana for sale (Health & Saf. Code, § 11359), committed in association with or for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). Jackett pleaded guilty in case 883 on February 20, 2013, and, while out on bail and awaiting sentencing in case 883, committed the murder in this case. On August 15, 2014, Jackett's probation in case 883 was revoked and he was sentenced to three years in prison.

2. Analysis

Jackett contends that he received ineffective assistance of counsel when he admitted the prison prior for case 883 because he was not sentenced to prison in case 883 until 18 months *after* the murder. Accordingly, the prosecution could not have proven the truth of the third prison prior allegation because the evidence was legally insufficient. Because the prison prior enhancement for case 883 was resolved by an admission instead of a true finding, Jackett contends the admission and the sentence imposed thereon should be vacated based on the failure of defense counsel to properly advise him. (*Strickland*, *supra*, 466 U.S. at pp. 687-694; *In re Brown* (2013) 218 Cal.App.4th 1216, 1226 [trial counsel has affirmative duty to investigate the validity of prior conviction allegation].) The People concede the error and we concur.

A trial court is authorized to impose an additional one-year term for each prior separate prison term served for any felony. (§ 667.5, subd. (b).) The enhancement is triggered the date the new offense is committed. (*People v. Weeks* (2014) 224 Cal.App.4th 1045, 1051.) In *Weeks*, the trial court erred by finding defendant's 2006

offense constituted a prison prior because defendant had not yet completed his prison term for the 2006 offense when the new offenses took place. (*Ibid.*)

Here, Jackett was out on bail in case 883 when he committed the charged murder. Thus, he could not have completed a prison term in case 883 before committing the murder in this case. Accordingly, he received prejudicial ineffective assistance when he pleaded guilty to a prison prior that the prosecution would not have been able to prove absent his admission. Jackett's admission to the prison prior for case 883 must be stricken and the sentence imposed thereon must be vacated.

IV. *SEVERANCE*

A. *Additional Background*

Before trial, in the context of whether defense counsel wanted to stipulate to Jackett's status as a felon for the felon-in-possession counts, defense counsel inquired whether counts 3 through 8 could be "bifurcate[d]." The court responded that it would not bifurcate count 2, the possession count related to the murder. Defense counsel agreed, but asked whether the court could bifurcate counts 3 through 7, the child endangerment counts and the possession count related to those charges. The court did not see the point of severing those charges because they were in the same class as count 2.

After defense counsel asked to go off the record, the court stated, "Well, why don't we do this. When we get done with the rest of the motions, then we can take some time and talk to your client and clarify with [the prosecutor]." Defense counsel responded, "Okay. Sure." The court later reminded defense counsel to discuss with Jackett whether

he wanted to consider a plea to counts 3 through 7 so that the facts of those counts would not be discussed at trial. The following morning, defense counsel informed the court that Jackett would not be pleading guilty to any count.

B. *General Legal Principles*

"[C]onsolidation or joinder of charged offenses 'is the course of action preferred by the law.' " (*People v. Soper* (2009) 45 Cal.4th 759, 772 (*Soper*).) When separate accusatory pleadings assert offenses that are "connected together in their commission [or are] of the same class of crimes or offenses, . . . the court may order them to be consolidated." (§ 954.) The purpose of section 954 is to avoid the " 'increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials.' " (*Soper, supra,* 45 Cal.4th at p. 772.) The term "same class of crimes or offenses" in section 954 refers to offenses that possess common characteristics or attributes, and courts have interpreted the term broadly. (See *People v. Grant* (2003) 113 Cal.App.4th 579, 586 [counts of burglary, concealing stolen property, and possession of property with a removed serial number were properly joined as crimes against property]; *People v. Thomas* (1990) 219 Cal.App.3d 134, 139-140 [charges of attempted murder, robbery, and ex-felon in possession of a firearm properly joined as belonging to the class of assaultive crimes against the person]; *People v. Lindsay* (1964) 227 Cal.App.2d 482, 492 [charges of kidnapping, robbery, and assault with a deadly weapon were properly joined as offenses against the person].)

" 'When . . . the statutory requirements for joinder are met, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in

denying the defendant's severance motion. [Citations.] In determining whether there was an abuse of discretion, we examine the record before the trial court at the time of its ruling. [Citation.] The factors to be considered are these: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case.' [Citation.] 'Even if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the "defendant shows that joinder actually resulted in 'gross unfairness' amounting to a denial of due process." ' " (*People v. Pettie* (2017) 16 Cal.App.5th 23, 42 (*Pettie*).)

C. *Analysis*

Jackett contends the trial court erred by failing to sever the three child endangerment counts, the possession count related to those charges, and the later possession charge because these offenses occurred 11 and 17 months, respectively, after the victim's murder, and the joined counts were unrelated to the murder charges in every respect except for that fact that the he was also charged with being a felon-in-possession for the murder. He claims that the joint trial of the counts opened the door for the jury to receive evidence that he had engaged in bad acts involving firearms on multiple occasions, including acts involving firearms that endangered the lives of children. Without joinder of these counts he contends that the jury would not have been permitted

to hear about these bad acts under any conceivable evidentiary theory. Noting the paucity of evidence connecting him to the murder and the lack of the murder weapon, he claims that the jury's receipt of evidence showing his involvement with firearms, including endangering children, was prejudicial to the degree it denied him a fair trial and due process.

The People respond that Jackett either forfeited the severance issue by failing to clearly make a motion to sever, or he abandoned his request by failing to press for a ruling. Anticipating this response, Jackett argues that he received ineffective assistance of counsel if we find the issue forfeited or abandoned. We need not resolve the forfeiture issue because, even assuming Jackett properly preserved this claim, it fails on the merits. For this reason, we reject his related ineffective assistance of counsel claim.

Jackett does not dispute that his murder and felon in possession charges were properly joined to the child endangerment and other felon-in-possession charges under section 954 because they pertain to the same class of assaultive crimes against a person. Because the statutory requirement for joinder was satisfied in this case we turn to whether Jackett showed a substantial risk of prejudice at the time the trial court denied severance, or actual gross unfairness at trial. (*Pettie, supra,* 16 Cal.App.5th at p. 42.)

Jackett argues, and the Attorney General impliedly agrees, that there was no cross-admissibility of evidence. We concur that there was no cross-admissibility of evidence. Nonetheless, "the absence of cross-admissibility does not, by itself, demonstrate prejudice." (*People v. Kraft, supra,* 23 Cal.4th at p. 1030; see also *People v. Johnson*

(2015) 61 Cal.4th 734, 751 ["absence of cross-admissibility cannot alone establish the substantial prejudice necessary to make severance mandatory"].)

In this situation, "we proceed to consider 'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses.' " (*Soper*, *supra*, 45 Cal.4th at p. 775.) In a noncapital case like this one, that requires an assessment of "(1) whether some of the charges are particularly likely to inflame the jury against the defendant[, and] (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges . . . ." (*Ibid.*) To meet his burden of showing a substantial danger of prejudice, Jackett must show the ruling fell outside the bounds of reason. (*Id.* at p. 774.)

Based on the record before the trial court in ruling on the severance motion, Jackett has failed to demonstrate prejudice. The child endangerment and possession of a firearm counts were not more inflammatory than the murder charge and other charged count for possessing a firearm. The child endangerment counts were not more serious than the murder count and joinder of the offenses was not likely to inflame the jury against Jackett as no child suffered any injuries. This fact supports a finding there was no prejudice, much less a "clear showing of potential prejudice" (*People v. Sandoval* (1992) 4 Cal.4th 155, 172) absent joinder.

Finally, Jackett has not shown that the trial court abused its discretion in assessing the relative strength of the respective cases. A mere imbalance in the evidence does not

"indicate a risk of prejudicial 'spillover effect' militating against the benefits of joinder and warranting severance of properly joined charges." (*Soper*, *supra*, 45 Cal.4th at p. 781.) To prevail, a defendant must show an " 'extreme disparity' in the strength or inflammatory character of the evidence." (*People v. Ybarra* (2016) 245 Cal.App.4th 1420, 1436.) At the time the court ruled on the severance motion, the evidence supporting one set of charges could not be characterized as stronger than the other set, so this factor does not support Jackett's claim of prejudice. Jackett's reliance on what happened at trial, including Margie's admission that she lied to police, does not show an abuse of discretion because our review of an order denying a severance request is confined to the record before the trial court at the time it ruled on the motion. (*Pettie*, *supra*, 16 Cal.App.5th at p. 42.)

Jackett alternatively argues that, assuming the trial court properly joined counts 3 through 7, reversal is required because the joinder violated his federal constitutional rights. In evaluating this constitutional claim, we inquire whether events after the trial court's ruling " 'demonstrate that joinder actually resulted in "gross unfairness" amounting to a denial of defendant's constitutional right to fair trial or due process of law.' " (*People v. O'Malley* (2016) 62 Cal.4th 944, 969-970.) We will reverse a judgment for gross unfairness "only if it is reasonably probable that the jury was influenced by the joinder in its verdict of guilt." (*People v. Simon* (2016) 1 Cal.5th 98, 129-130.) "Appellate courts have found ' "no prejudicial effect from joinder when the evidence of each crime is simple and distinct, even though such evidence might not have been admissible in separate trials." ' " (*Soper*, *supra*, 45 Cal.4th at p. 784.)

Here, the evidence supporting the murder-related counts and the child endangerment counts were straightforward and distinct, and substantial evidence supported Jackett's convictions on each set of charges. (See *ante*, pts. I.B.& C [addressing evidence in child endangerment and related possession charge] & III.A.2 [addressing murder charge evidence].) Moreover, the court instructed the jury that each of the counts was a separate crime that must be separately decided. (CALCRIM No. 3515.) Nothing in the record indicates the jury failed to follow this instruction. (*People v. Merriman* (2014) 60 Cal.4th 1, 48-49 [absent contrary showing, jury presumed to follow instructions to consider each count separately].)

V. *FIREARM ENHANCEMENT*

Jackett's sentence included a term of 25 years to life based on the jury's true finding on the enhancement attached to count 1 that he had discharged a firearm and inflicted great bodily injury under section 12022.53, subdivision (d). Jackett contends, and the People concede, that this matter should be remanded for resentencing to allow the trial court to exercise its discretion whether to strike the firearm enhancement. We agree.

Under an amendment to section 12022.53, effective January 1, 2018, trial courts now have the power to strike or dismiss an enhancement otherwise required to be imposed by section 12022.53. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) The parties agree, and we concur, that the amendment to section 12022.53 applies retroactively. (*Ibid.*) Accordingly, the matter must be remanded to provide the court with the opportunity to exercise its discretion to strike or dismiss the firearm

enhancement. We express no opinion about how the court's discretion should be exercised.

VI. *REMAND FOR CONSIDERATION UNDER SENATE BILL NO. 1393*

Jackett was sentenced to a consecutive five-year term under section 667, subdivision (a), for his prior serious felony conviction. At the time of his sentencing, the trial court was required to impose this term under section 667, subdivision (a). While this appeal was pending, the Governor signed Senate Bill No. 1393, which amends sections 667, subdivision (a) and 1385 to provide the trial court with discretion to strike enhancements for serious felony convictions. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) The legislative changes became effective January 1, 2019. (*Ibid.*)

After we issued our original opinion on November 15, 2018, Jackett filed a petition for rehearing arguing that Senate Bill No. 1393 gives the trial court sentencing discretion to strike his five-year enhancement. We granted the petition. The Attorney General concedes that Senate Bill No. 1393 will apply to Jackett retroactively. We agree. (*Garcia, supra,* 28 Cal.App.5th at pp. 971-973.) The matter already is being remanded to give the trial court the opportunity to exercise its discretion under section 12022.53, subdivision (h). Jackett may raise his Senate Bill No. 1393 claim before the trial court at that time. We express no opinion on how the trial court should exercise its discretion.

VII. *CUMULATIVE ERROR*

Jackett contends the cumulative effect of the court's alleged errors deprived him of a fair trial. Except for the two sentencing errors above (which were not presented to the

jury), there were no errors. Thus, there was no cumulative error in this case. (*People v. Famalaro* (2011) 52 Cal.4th 1, 44.)

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated and the matter is remanded for the limited purpose of allowing the trial court to (1) strike Jackett's admission to the third prison prior and vacate the sentence imposed and (2) exercise its discretion with respect to the firearm allegation under Penal Code sections 1385, 12022.5, subdivision (c) and 12022.53, subdivision (h) and Senate Bill No. 1393. If appropriate following exercise of that discretion, the trial court is to resentence defendant accordingly and amend the abstract of judgment and the minute order of the sentencing hearing.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.